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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1132

STATE OF NEW MEXICO
ex. rel. ENVIRONMENTAL IMPROVEMENT AGENCY,
Petitioner,

vs.

ALBUQUERQUE PUBLISHING COMPANY,
a New Mexico corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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No.

STATE OF NEW MEXICO
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

The State of New Mexico, *ex rel.* Environmental Improvement Agency, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Mexico.

OPINION BELOW

The opinion of the New Mexico Supreme Court (App. A, *infra*) is not yet officially reported. It is unofficially reported at 571 P.2d 117.

JURISDICTION

The judgment of the New Mexico Supreme Court, requiring that a search warrant must be obtained before an inspection can be made, under the state Occupational Health and Safety Act, of Appellee's premises, was entered on October 26, 1977. (The judgment was contained within the opinion, and no separate judgment was filed.) A motion for rehearing was denied on November 15, 1977 (App. B, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the inspection provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), and the corresponding section of New Mexico's Occupational Health and Safety Act, § 59-14-9(A), NMSA 1953, violate the Fourth Amendment of the United States Constitution insofar as they authorize appropriate officials to inspect at reasonable times, without a warrant, commercial premises routinely occupied by an employer's work force.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Sections 18(b) and (c) (3) of the Occupational Safety and Health Act of 1970, 84 Stat. 1608, 29 U.S.C. § 667(b) and (c) (3), provides:

. . . .

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment –

. . .

(3) provides for a right of entry and inspection of all workplaces subject to the Act which is at least as effective as that provided in section 8, and includes a prohibition on advance notice of inspections,

. . . .

(2) Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. § 657(a) provides:

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized –

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

(3) Section 59-14-9(A), NMSA 1953, provides:

In order to carry out the purposes of the Occupational Health and Safety Act, the agency's authorized representatives, upon presenting appropriate credentials to the owner, operator or agent in charge, are authorized:

(1) to enter and inspect any place of employment at reasonable times and without delay; and

(2) to question the employer and employees and to inspect and investigate during regular working hours and

at other reasonable times and within reasonable limits and in a reasonable manner, the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein.

(4) The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(5) Article II, Section 10 of the Constitution of the State of New Mexico provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

STATEMENT

(1) No purpose would be served by a lengthy statement of the case. The issues are essentially identical with those now before this Court in *Marshall v. Barlow's, Inc.*, No. 76-1143, 45 U.S.L.W. 3686 (April 18, 1977), with the exception that we do not agree that the statutes in question should be interpreted to require that a warrant be obtained prior to inspection. We believe that such an interpretation is equivalent to a holding that the statutes are unconstitutional, inasmuch as a warrant could be obtained in the absence of the statutes: To say that a statutory provision is consistent with the Constitution only if one reads into the statute a requirement that the person attempting to invoke the statute do what he would have to do in the

absence of the statute is to say that the statute is not consistent with the Constitution, *i.e.*, that the statute is unconstitutional.

(2) On October 15, 1976, a compliance officer of the Occupational Health and Safety Division of the New Mexico Environmental Improvement Agency ("Agency") attempted an inspection, pursuant to the authority of § 59-14-9, NMSA 1953, of the Albuquerque Publishing Company's ("Company") premises at Seventh and Silver, SW, Albuquerque, New Mexico. The Company refused to allow the inspection of said premises.

The Agency subsequently filed suit in state district court for a preliminary and permanent injunction requiring the Company to allow an occupational health and safety inspection of its premises. The Company filed an answer which admitted that entry had been denied, but alleged that such entry without a warrant issued by a judicial officer was unconstitutional in violation of the Fourth Amendment of the United States Constitution and Article II, Section 10, of the New Mexico Constitution. The Company also counter-claimed, requesting that a preliminary and permanent injunction be entered against the Agency enjoining it or its agents from making such inspection without a search warrant.

Following oral argument before the district court on the Company's motion for judgment on the pleadings, and the request of both parties for a preliminary and permanent injunction, the court entered judgment for the Company, holding that a warrantless search of the non-public portion of the Company's premises, pursuant to § 59-14-9, NMSA 1953, is in violation of the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. The Agency appealed to the New Mexico Supreme Court.

On October 26, 1977, following briefs and oral argument, the New Mexico Supreme Court affirmed the judgment of the of the district court, and held

> . . . that a non-consensual, warrantless administrative inspection of business premises can be made only when:

> (1) the enterprise sought to be inspected is engaged in a business pervasively regulated by state or federal government; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and (4) the inspection is carefully limited as to time, place and scope.

The Agency filed a motion for rehearing, which was denied on November 15, 1977. The mandate of the New Mexico Supreme Court was filed on November 28, 1977. The mandate was recalled and judgment stayed, pursuant to the Agency's motion, on December 9, 1977, to allow the Agency to file this petition.

(3) The opinion of the New Mexico Supreme Court did not specifically state whether its judgment was based upon state or federal grounds. The Company's challenge in district court was based both on the Fourth Amendment to the United States Constitution and on Article II, Section 10 of the New Mexico Constitution (the state equivalent to the Fourth Amendment), and the judgment of the district court purported to be based upon both grounds. Since the judgment of the supreme court affirmed the judgment of the district court, it would appear that it also was based, by implication, on both state and federal grounds. A close analysis of the record, however, will show that the only possible grounds for the judgment are the federal grounds.

The judgment of the district court cited no cases, but the District Judge did state his reasons in a letter to the attorneys. All cases cited in the letter on the issue here involved were federal cases based upon federal constitutional grounds. Similarly, cases cited by the supreme court in its opinion were federal cases based upon federal constitutional grounds. In fact, the supreme court specifically stated that it

> . . . chooses to follow the theories advanced in *Dunlop v. Hertzler Enterprises,* 418 F. Supp. 627 (D.N.M. 1976), *appeal docketed* No. 76-2020 (10th Cir., November 5, 1976) and *Usery v. Centrif-Air Machine Co.*, 424 F. Supp. 959, 961 (N.D. Ga. 1977).

It is therefore apparent that there are, in fact, no adequate state grounds to support the judgment of the New Mexico Supreme Court.

(4) The decision of a state court holding a state statute unconstitutional, even on federal grounds, is not, of course, reviewable on appeal to this Court. Superficially, this *appears* to be the case here, and for this reason certiorari is sought, rather than an appeal. But, although the Company explicitly challenged only the state statute [§ 59-14-9(A), NMSA 1953], the corresponding federal statute [29 U.S.C. § 657(a)] was implicitly challenged as well. This is true because: (1) the two statutes are virtually identical; and (2) the state statute was enacted specifically so that New Mexico could enforce its own laws and regulations in the occupational health and safety field, in accordance with § 18 of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 667. One of the requirements which must be met in order for a state to have its plan approved by the Department of Labor, in accordance with § 18 of the federal Act, is that the state must provide ". . . for a right of entry and inspection of all workplaces subject to the Act *which is at least as effective as that provided in Section 8. . . .*" [29 U.S.C. § 667(c) (3) (emphasis added).] The right of entry and inspection provided by the state statute is exactly the same as that provided by the federal statute, neither more nor less effective. Given these considerations, it is obvious that if the state statute is unconstitutional, the federal statute must also be unconstitutional; and the New Mexico Supreme Court impliedly held 29 U.S.C. § 657(a) (the federal counterpart of § 59-14-9(A), NMSA 1953) unconstitutional. Therefore, although this petition asks for a writ of certiorari, Petitioner believes the facts show that it would have been entitled to an appeal under 28 U.S.C. § 1257(1).

REASONS FOR GRANTING THE WRIT

(1) The issues presented in this petition are of substantial importance, for essentially the same reasons advanced in the jurisdictional statement for *Marshall v. Barlow's, Inc., supra,* except as those reasons relate to the question as to whether the statutes should be interpreted to require that a warrant be obtained prior to inspection. No useful purpose would be served by repeating those reasons here. Instead, we adopt by reference Part 1 of that portion of the *Barlow's* Jurisdictional Statement relating to the substantiality of the questions. In so doing, we are fully aware that *Barlow's* is an appeal, whereas this is a petition for a writ of certiorari, which involves different considerations. Despite this technical difference, however, there is no essential difference in the issues involved, and this petition should be viewed with the same considerations as an appeal.

(2) Congress did *not* put a search warrant provision into 29 U.S.C. § 657(a), although, as the district court in *Barlow's* points out, it "was able, had it wished to do so." Neither did the New Mexico legislature put a search warrant provision into § 59-14-9, NMSA 1953, as, indeed, it could not have done and still met the requirements of 29 U.S.C. § 667(c) (3). The warrant requirement was enacted into law by the courts in *Hertzler, supra,* in *Centrif-Air, supra,* and in the instant case. By these acts of judicial legislation, these courts, including the New Mexico Supreme Court, have superficially avoided a holding of unconstitutionality.

In their opinions, these courts have held that the federal and state statutes allow inspectors to inspect either by consent of the employer or by obtaining a search warrant. But that is exactly what the inspectors could do without the statutes. They do not need a statute if they have consent to search; they do not need a statute to search under a search warrant. This judicial redrafting of the law has construed the statute out of existence.

Congress did not include the requirement of a search

warrant, and therefore the law, as written by Congress, must be unconstitutional under the holdings of the courts in *Hertzler, Centrif-Air,* and the instant case. To interpret the holdings of these courts, including the New Mexico Supreme Court, as *not* holding the statute unconstitutional would be to elevate form over substance.

(3) The validity of § 59-14-9(A), NMSA 1953, as well as that of similar statutes adopted by many other states, pursuant to 29 U.S.C. § 667, depends upon the validity of 29 U.S.C. § 657(a). This Court's decision in *Barlow's* will be controlling not only as to the federal statute, but also as to the corresponding New Mexico statute, and every similar statute of other states. The New Mexico Supreme Court recognized this when it stated in its opinion that "[t]he issue of whether state and federal agencies are empowered to conduct non-consensual inspections of business premises for health and safety purposes without search warrants has generated a vast amount of recent litigation in state and federal courts. The matter is now before the United States Supreme Court." (Citation to *Barlow's* omitted.)

It is, therefore, appropriate that this Court decide this case at the same time it decides the *Barlow's* appeal.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. 28 U.S.C. § 2403 may be applicable.

Respectfully submitted,

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February 10, 1978

APPENDIX A

Filed: October 26, 1977

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
ENVIRONMENTAL IMPROVEMENT AGENCY,
vs. Plaintiff-Appellant,

No. 11,344

ALBUQUERQUE PUBLISHING COMPANY,
a New Mexico corporation,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
Rozier Sanchez, Judge

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OPINION

EASLEY, J.

The issue of whether state and federal agencies are empowered to conduct non-consensual inspections of business

premises for health and safety purposes without search warrants has generated a vast amount of recent litigation in state and federal courts. The matter is now before the United States Supreme Court. *Barlow's, Inc. v. Usery*, 424 F.Supp. 437 (D. Idaho 1977) (three judge court), *appeal docketed sub nom. Marshall v. Barlow's, Inc.*, No. 76-1143, 45 U.S.L.W. 3686 (April 18, 1977).

Another lengthy analysis here of the legislative background and the various conflicting opinions could be of no substantial benefit to the New Mexico bench, bar or the litigants.

This Court chooses to follow the theories advanced in *Dunlop v. Hertzler Enterprises*, 418 F.Supp 627 (D.N.M. 1976), *appeal docketed* No. 76-2020 (10th Cir. November 5, 1976) and *Usery v. Centrif-Air Machine Co.*, 424 F.Supp. 959, 961 (N.D. Ga. 1977). In so doing, we hold that a non-consensual, warrantless administrative inspection of business premises can be made only when: (1) the enterprise sought to be inspected is engaged in a business pervasively regulated by state or federal government; (2) the inspection will pose only a minimal threat to justifiable expectations of privacy; (3) the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest; and (4) the inspection is carefully limited as to time, place and scope.

There was no showing in this case that defendant-appellee, Albuquerque Publishing Company, was or is engaged in a pervasively-regulated business. Thus the plaintiff-appellant, State Environmental Improvement Agency, failed to satisfy the first test, which is fatal to its application for an order compelling inspection. We need not determine whether the other elements of minimal intrusion, urgency and reasonableness have been satisfied.

We therefore conclude that this state agency, in the absence of the consent of the Albuquerque Publishing Company to inspect its premises, must obtain a search warrant based upon a

preliminary finding of probable cause by a judicial officer before being allowed to inspect the premises involved.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

s/ Mack Easley
JUSTICE

WE CONCUR:

s/ H. Vern Payne
H. Vern Payne, Justice

s/ William R. Federici
William R. Federici, Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Tuesday, November 15, 1977

NO. 11,344

STATE OF NEW MEXICO, ex rel.
ENVIRONMENTAL IMPROVEMENT
AGENCY,
Plaintiff-Appellant, Bernalillo County

vs.

ALBUQUERQUE PUBLISHING COMPANY,
a New Mexico corporation,
Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellant for a Rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of Appellant for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY

s/ Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico

(SEAL)